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IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

Brief Amicus Curiae of Citizens for Decent Literature Inc., an Ohio Corporation, in Support of Respondent's Petition for Rehearing.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc. (Short Title, CDL), an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws.

CDL participated as Amicus Curiae in Support of the Commonwealth of Kentucky, prior to the submission of the case for decision. We submit herewith our Brief Amicus Curiae in Support of the Commonwealth's Petition for Rehearing.

I.

The Result Is an Unconstitutional Abridgement of Rights Retained by State Governments Under the Tenth Amendment.

A. Obscenity Is Primarily a Question of Fact for the Jury's Determination.

The obscenity controversy places in the balance two opposing forces which are set into motion by our constitutional form of government. On the one hand, there is a claim of the individual's right of free speech and press, as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. On the other hand, there is the claim to supremacy of the right of government to regulate matters relating to public morals, by proscribing obscenity, as reserved to state governments by the Tenth Amendment to the Federal Constitution.

When in 1957, this Court addressed itself to the problem, it drew the balance between the two conflicting powers which it expressed in the Roth-Alberts test, namely "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *When such a state of facts exists,* the police power, reserved to state governments by the Tenth Amendment, is operable, and can act to proscribe such material.

In excluding an area of activity from constitutional protection, the Roth Court defined the same in language traditonally understood, by Anglo-Saxon norms, as phrasing an inquiry which poses a jury question. The determination of the "average person" in the "community" is commonly regarded in our jurisprudence as synonymous with a "verdict" under our jury system. In "Obscenity In The Supreme Court" appearing in XL Notre Dame Lawyer 1, the author, in urging that this tradition be retained in the area of obscenity, comments on this principle:

> "The identification of the jury with the community has been a characteristic of juries from their earliest development in the 13th century as quasi-judicial finders of fact; 'the verdict of the jurors is not just the verdict of twelve men; it is the verdict of a pays, a county, a neighborhood, a community. . . . (T)he voice of the twelve men is deemed to be the voice of the country-side, often the voice of some hundred or other district which is more than a district, which is a community. The (royal) justices seemed to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the country.' II Pollock and Maitland, History of the English Law 624 (2d ed. 1952)."

and at page 8:

> "The jury is the mechanism provided by the common law for determination of questions involving the presence of absence of due care, reasonableness, prudence, decency and other concepts reflecting the common sense and/or conscience of a community. . . ."

In *United States v. Kennerley,* 209 Fed. 119 (SDNY 1913) Judge Learned Hand, often referred to as "the father of the modern obscenity law", drew an analogy between the standard of obscenity and the standard of care in negligence trials. At page 121, Judge Learned Hand said:

> "Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a *jury* should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.
>
> "Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste,

the vague subject-matter is left to the gradual development of general notions about what is decent. A *jury* is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech." (Our emphasis.)

Judge Learned Hand acknowledged in *Kennerley* that the Court's powers were limited, where at page 120 he said:

"Whatever be the rule in England, in this country the jury must determine under instructions whether the book is obscene. The court's *only power is to decide whether the book is so clearly innocent that the jury should not pass upon it at all.* U.S. v. Clarke (D.C.) 38 F. 500; U.S. v. Smith (D.C.) 45 F. 478. *The same question arises as would arise upon motion to direct a verdict at the close of the case.* Swearingen v. U.S., 161 U.S. 446, 16 S.Ct. 562, 40 L.Ed. 765, did not decide that the court is finally to, interpret the words, but that matter was left open, because the instructions in any case misinterpreted the statute. The question here is, therefore, whether the jury might find the book obscene under proper instructions. . . ." (Our emphasis.)

Speaking for the Circuit Court of Appeals, 2d Circuit, in *United States v. Levine* (1936), 83 F. 2d 156. 157 (cited by Roth at footnote 26 as consistent with the obscenity law expressed therein), Judge Learned

Hand said the following concerning the role of the jury and its determination:

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. *We impose such a duty upon a jury* (Rosen v. U.S., supra, 161 U.S. 29, 42, 16 S.Ct. 434, 480, 40 L.Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors. We mentioned some of these in U.S. v. One Book Entitled Ulysses, supra, 72 F.2d 705; the work must be taken as a whole, its merits weighed against its defects (Konda v. U.S. (C.C.A.7), 166 F.9); if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. *Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc, like the standard of care.*" (Our emphasis.)

There is nothing in this case which warrants such a radical departure from traditional notions of Anglo-Saxon jurisprudence.

II.

The Result Reached Is an Unconstitutional Abridgement of the Right of the People to a Jury Trial in Criminal Cases.

At Common Law, the people's interest in a jury trial in criminal cases was equal to that of the defendant. The jury was considered to be an essential part of the judicial machinery. In 1 Hyatt on Trials, at 490 (1924), the author writes:

> "At the common law, and under the earlier American decisions, it was universally held that the accused person in a criminal prosecution could not waive jury trial in any case. The only difference of opinion upon the point was in the reason assigned for this rule. So far as the common law practice is concerned the reason most commonly accepted was that a jury was an essential part of a court having jurisdiction to try such cases, and defendant could no more waive the jury than he could waive any other indispensable part of the judicial machinery. If he plead not guilty, he was thereafter bound to submit himself to trial in the only manner provided. But the rule was early relaxed, in America, at least, and waiver was allowed by mutual consent or in the discretion of the court. It was said that the inviolability clause of the Constitution was for the state's benefit, as well as for that of the accused. In some cases the rule against waiver was put upon the ground of public policy. In the later decisions, under the influence of constitutional and statutory enactments, the common law rule has been widely relaxed, but wherever it

> is followed, and waiver is not allowed, it is almost invariably upon the ground that the Constitution guarantees a common law trial, and there can be no such trial without a jury."

Very recently this Court in *Singer v. U.S.*, 13 L. Ed. 2d 630 considered this issue in depth in the federal area. There, a unanimous Court held at page 638:

> "The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal *which the Constitution regards as most likely to produce a fair result.*" (Our emphasis.)

In the Commonwealth of Kentucky, the people in the State Constitution are entitled to a jury trial in all criminal proceedings. Kentucky Constitution, Section 11. See "Trial Juries and the New Rules—Right to Trial by Jury" in 47 Kentucky L.J. 185.

This being a review of a jury trial in a state court, involves rights arising out of the Seventh Amendment to the Federal Constitution which accords special importance to jury determinations. While this Court will review the findings to analyze the facts in order to pass upon a federal question, *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 710 (March 9, 1964), where no constitutional question is shown to be involved, the jury's determination is supreme.

Very recently, this right of the poeple as applied to obscenity prosecutions was squarely ruled upon by the

California Court of Appeal, Second District, Division 2. Judge Herndon, speaking for the court in *People v. Noroff* in a nudist magazine case, 58 Cal. Rptr. 172 (April 13, 1967), said at page 178, in resolving the issue in the people's favor:

> "Although ordinarily it might be regarded as too elementary to deserve specific comment, in the context of the instant appeal it appears appropriate for us to endorse appellant's observation that in this state the right to a jury trial is vested in the People as well as in the defendant (Cal. Constitution, art. 1, Section 7; People v. Spencer, 170 Cal. App.2d 145, 149, 338 P.2d 484, and cases cited). Further, as noted in the Comments to the American Law Institute's Model Penal Code, Tentative Draft No. 6, page 47: 'Jury trial in this field (obscenity prosection) has the merit of requiring unanimous condemnation by this sample of the general population on issues which seem to be peculiarly within their competence: what is the predominant appeal of the material to the ordinary adult, and what are the outer limits of custom in description and representation of sexual matters.' "

Justice Herndon's rule of law should govern in this case. Two Kentucky juries found Austin guilty of the obscenity crime. In view of the nature of the subject matter, those verdicts should remain inviolate.

III.

Considering the Result Reached as Being Solely a Matter of Public Policy, Other Alternatives Should Have Been Weighed in the Balance and Made the Subject of Argument.

If one were to attempt to reconstruct the deliberations of the members of this Court prior to this decision (a feat made difficult by the fact that no briefs or oral argument was had upon the issue which decided the case) one might reasonably conclude that a near majority of the Court favored establishing the mens rea requirement for the retailer obscenity crime at "reckless conduct." See *Mishkin v. N.Y.*, 383 U.S. 502 fn. 9. Certiorari was granted as to *Austin* and *Redrup*, both retailer cases, on Apr. 25, 1967, just 35 days after the *Mishkin* (publisher) decision. This Court had already established "reckless conduct" as a constitutional level in recent cases in other areas. *New York v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana*, 379 U.S. 64. *Rosen v. U.S.*, 161 U.S. 29, however, imposed a serious barrier in its holding that the mens rea was satisfied if only knowledge of the contents were proved. With no majority decision in sight on this issue (compare *Time v. Hill*, 17 L. Ed. 2d 456, 472 and the manner in which Justices Black and Douglas voted) it does appear as though a majority "backed" into a decision it had no intention of rendering, even as late as Oct. 10, 1967, when the cases were taken under submission.

Under one possible analysis of the *per curiam* opinion, this Court, finding itself unable to reach a clear majority decision on the scienter issue, sidestepped that issue and, instead of proceeding as urged by

Justices Harlan and Clark, decided the case along much the same lines by regarding the "obscenity vel non" issue itself as a concept which partakes of two variable factors: (1) the nature of the materials, and (2) the use to which they are put. See National Decency Reporter Vol. III No. 6 June-July 1966 "Analysis of the Mishkin, Ginzburg and Fanny Hill Decisions." A close inspection of this analysis in relation to a criminal prosecution and the "conduct" principle upon which variable obscenity is predicated and the rationale behind the obscenity crime will demonstrate, however the fallacy of this reasoning.

We think this Court should have entertained further argument on other alternatives, such as the possiblity of recognizing different scienter requirements for publishers and retailers. See *Mishkin v. N.Y.*, 383 U.S. 502 at fn. 10.

This Court might also have considered the rationale recently employed in an obscenity case by an intermediate California appellate court, particularly as the division of materials into 3 classes in that case, related to the *Gent* case and the injunctive process. Logically the injunctive process might be limited to hard-core pornography, described by the Misuraca Court as Class 2 material. The net result would be to nullify the "prior restraint" aspects of *Gent*, while at the same time restoring to the state the means, by way of criminal attack, of lessening the impact of such materials in the community. See *People of the State of California v. Misuraca et al., Appellate Dept. of the Los Angeles Superior Court, C.R.A. 7179*, set forth herein in full at Appendix "A."

IV.

This Court's Limited Concern for Juvenile Laws, Assaults on Individual Privacy and Pandering, Noted in the Per Curiam Opinion Overlooks a Major Concern of the State Courts—the Assault on Public Morality.

Louis B. Schwatz, co-reporter of the Model Penal Code, explains the philosophy of the obscenity crime in "Morals Offenses and the Model Penal Code", appearing in 63 Columbia Law Review 669, 671 (cited by this Court with approval in *Ginzburg v. U.S.*, 16 L. Ed. 2d 31, at page 38, fn 12; page 39, fn 14; page 41, fn 19; and *Mishkin v. N.Y.*, 16 L. Ed. 2d 56 at page 63, fn 9) at page 671:

> ". . . the great majority of people believe that the morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism. . . ."

and at page 672:

> "If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by law. . . ."

Mr. Schwartz continues at page 681:

> "But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying: 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraints we seek to cultivate through family, church, and school.' *The interest being protected is* not, directly or indirectly, the souls of those who might be depraved or corrupted by the obscenity, but the *right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*"

In sum, the case for the governmental action taken by the Commonwealth of Kentucky was stated by Justice Harlan in his concurring opinion in *Roth-Alberts* (*supra*), at page 502:

> "The State can reasonably draw the inference that over a long period of time the *indiscriminate dissemination* of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . . (our emphasis).

It is the *presence* of the degrading materials which is thought to cause the harm, much like the baudy house of old. *Rex v. Curl* (1727), 2 Strange 788.

The highest courts in 8 out of the 9 states which have had the girlie magazine problem before them have shown a greater concern for the public morals than have the 7 members of this Court who voted in support of the per curiam opinion. See *Wisconsin v. Joseph Chobot,*

12 Wisc. 2d 110, 106 N.W. 2d 286 (Nov. 29, 1960) appeal dismissed for want of a Federal question 368 U.S. 15 (Oct. 23, 1961) rehearing denied 368 U.S. 936 (Dec. 4, 1961) involving four girlie magazines; "Spice", "Adam", "Spree" and "Blondes, Brunettes and Redheads"; *Harry Monfred et al. v. Maryland,* 226 Md. 312, 173 A. 2d 173 (Aug. 9, 1961) involving five girlie magazines "Candid", "Consort", "Sextet," "Cloud 9" and "Torrid"; *Arthur Goldstein v. Virginia* (unreported), writ of certiorari denied 372 U.S. 910 (Feb. 18, 1963); *Connecticut v. Joseph S. Andrews,* 150 Conn. 92, 186 A. 2d 546 (Nov. 6, 1962) involving two girlie magazines "Modern Man—1960 Yearbook of Queens" and "Modern Man"; *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 228 fn 2 (Dec. 16, 1963) involving five girlie magazines: "Mermaid", "Spree" "Exotic Adventures", "Sir Knight" and "Ace"; *Kentucky v. Austin,* .... Ky. ...., 386 S.W. 2d 270 (Jan. 22, 1965) involving two girlie magazines "Spree" and "High Heels"; *Gent et al. v. Arkansas,* 393 S.W. 2d 219 (May 24, 1965) involving eight girlie magazines: "Cavalcade", "Gentlemen", "Ace", "Sir", "Gent", "Swank", "Modern Man" and "Bachelor"; and *Louisiana v. Percy Henry,* ..... La. ..... (May 1, 1967), involving eleven girlie magazines: "Gem", "Carnival", "Rogue", "Sir", "Ace", "Caper", "Jaguar", "Gent", "Wildcat", "Sir Year Book" and "Nuggett". The only state high court to disagree, did so by a narrow 4-3 majority and not without disagreement between the majority judges who could not agree upon a majority opinion. See CDL Commentaries on the Law of Obscenity Vol. 1 No. 2 at pages 1-16.

But then this is only natural, for state governments have a special concern here, for "the domain of sexual

morality is pre-eminently a matter of state concern", Justice Harlan concurring in *Alberts v. Calif.*, 354 U.S. 476, 502. We think Justice Harlan was correct when he said at page 501:

> "In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgments under the 14th Amendment is a narrow one. We do not decide whether the policy of the state is wise, or whether it is based upon assumptions scientificially substantiated. We can inquire only whether the state action so subverts the fundamental liberties implied in the Due Process Clause that it cannot be sustained as a rational exercise of power. . . ."

Until *Austin* and *Redrup,* we had thought this Court's decisions in obscenity cases during the years 1957-1964 to have recognized the special public policy favoring the obscenity laws and to have been in support of criminal prosecution by the states of those dealing in obscenity. See Brief Amicus Curiae of Citizens for Decent Literature Inc., filed in *A Book Entitled Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts,* 383 U.S. 413. With this Court's opinion in *Redrup-Austin-Gent,* our convictions have suffered.

We had thought that Chief Justice Warren was in agreement that such criminal matters were properly within the domain of state governments and the individual communities. See Chief Justice Warren dissenting in *Ohio v. Jacobellis,* 378 U.S. 184, 202. It was during arguments in *A Quantity of Books v. Kansas,* 378 U.S. 205 in April of 1964 that the Chief Justice sharply re-

buked Attorney General Ferguson of Kansas (as reported in the Los Angeles Times in April 1964):

> "Warren then asked; 'why don't law enforcement officers do their jobs?' He said there was 'not a city in this country' where pornography is not sold with impunity.
>
> "It would be simplier to prosecute sellers of pornography under the Kansas obscenity law, and after a conviction it would then be easy to prevent circulation of the books as well, Warren asserted.
>
> "He suggested that the state did not follow this procedure because its easier to burn books than it is to prosecute a seller of obscenity."

The Chief Justice's vote on May 8, 1967 in *Austin and Redrup* fails to give support to his advice given the Kansas Attorney General 3 years earlier.

At various times, other justices have indicated views entirely at odds with their vote in these cases. See Justice Brennan speaking for the majority in *Roth v. Alberts,* 354 U.S. 476 at 490, and dissenting in *Kingsley Book Inc. v. Brown,* 354 U.S. 436; Justice Stewart's opinion in *Volanski v. U.S.,* 246 F. 2d 842, 845 and Justice Black's opinion in *Kingsley Corp. v. Regents of Univ. of New York,* 360 U.S. 684, 690.

In our reappraisal we are forced to conclude that this Court does not have a clear understanding of the practical effect of its multi-faceted, esoteric opinions on the rulings of the trial judges, the prosecutors efforts under the law and the continuing struggle of the communities to halt the moral erosion and the sagging standards of sexual morality within the community.

For example, the separate opinion of Justices Brennan, Warren and Fortas in the *Fanny Hill* case was the signal for the industry to unload the classical examples of pornography on the markets in the communities (the so-called "classics")—plain, unadulterated hard-core pornography in the simplest form. Typical of this are the many versions of "My Secret Life" and "The Complete Marquis de Sade" published by Holloway House. The prosecutors were and are frozen in fear at the implications of the separate opinion of the three justices.

Before the ink was dry, the *per curiam* opinion in *Redrup-Austin-Gent* had an adverse effect upon the trial of an obsenity case in San Diego. A news clipping from the San Diego Union of May 13, 1967, reporting on the trial of *People v. Effie,* is included herein as Appendix A. In a phone conversation, Deputy City Attorney Shain B. Haug, who tried the case, stated that the news account was substantially correct and gave the following additional facts:

Effie's is a relatively smaller liquor store fronting on Broadway in San Diego. About ½ to ¾ of the space is devoted to magazine racks, wall racks for paperbacks and magazines. The bulk of this material is sex oriented (nudist magazines, bondage materials, sex paperbacks etc.). The obscenity charge involved eight publications: "International Nudist Sun", Vol. 1 # 5, "Muscleboy" Vol. 2 #4 (June, July 1966), "Butch" Issue 4, "Male Nudist Portfolio" #5, Booklets—"Paul in Bondage", "Roommates Judo Lesson", "Susie's Sisterly Spanking", and "Leather Loving Lena." The arrest was made on April 12, 1966.

The trial commenced on Wednesday May 3 and by Friday May 5 the jury was selected. On Monday May 8, the prosecutor put on his case in chief including testimony on two sales and the execution of a search warrant. Two articles had been purchased, International Nudist Sun, Vol. 1 #5 and Muscleboy. Based upon the personal observations of police and prosecutor, a search warrant naming the six other items was sought, issued and executed. Thereafter the people showed the facts surrounding the arrest, a physical description of the premises, a diagram of the premises, 12 photographs of the premises, identification as to where each of the books was picked up, demonstration of how the magazines were wrapped in plastic bags, the testimony of a psychologist on the effect of the material and its appeal to prurient interest, and testimony of a man with a master's degree in journalism and English on limits of candor and social importance. The materials were then read into the record. On Tuesday May 9th the reading was continued. At 2:00 P.M. the news accounts of this Court's decisions were discussed by the court and counsel, and the matter was continued to Friday.

On Thursday, the opinion in *Redrup-Austin-Gent* was made available through C.C.H. Supreme Court Bulletin and oral arguments had thereon. The prosecutor argued that pandering could be shown by other types of circumstantial evidence, such as the officer's description of the display for sale and the photographs thereof, the psychologists evidence as to the appeal of the matter to prurient interest and the expert testimony on limits of candor and social importance. Further, the prosecutor argued that Redrup and Gent and Austin

should be considered only to be a disposition of the matter which was before the Court.

The Court ruled that where a retailer was tried for the sale of material which was not clearly hard-core pornography, the people had to prove during their case in chief substantial evidence of pandering and that mere display for sale did not meet the requirement of substantial evidence of pandering. Judge Curran ruled that anything less than the *Ginzburg* type of solicitation —even if of a different character—was not substantial evidence of pandering and that since the retailer had not given out circulars or advertised pornography for sale, the people's case was not sufficient.

The people made the above offer of proof on pandering and rested. The defendant put on no case and the parties were allowed to argue to the jury. The Court instructed the jury to acquit under Penal Code Section 1118 which reads:

> "If at anytime after the evidence on either side is closed, the Court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice."

The prosecutor asked for an instruction under Ginzburg that the jury could consider pandering, *i.e.*, how the purveyor treated the material in reaching their conclusion on the obscenity of the matter. Judge Curran held that the law no longer was primarily concerned with the obscenity of the material—in other words—the prosecution was no longer for the sale of obscenity, but was now for the active solicitation of sales.

After two hours the jury was undecided at 9-3 for conviction and asked for further instructions on what is insufficient evidence as that term applied to pandering evidence. After another hour, they stood at 7-5 for conviction and asked for further instructions. The Court then instructed them that if the defendant was found guilty and the case were appealed, the conviction would be reversed. It then took the jury 45 minutes after that to return a not guilty verdict.

From the above practical example of what can be expected to occur throughout the nation as a result of these decisions, we think a rehearing is in order, if only to clarify the mistaken interpretation that this Court's reference to "an assault upon individual privacy" and its citation of *Public Utilities Commissioner v. Pollak*, 343 U.S. 451 was meant to qualify the philosophy of the obscenity laws expressed in "Morals Offenses and The Model Penal Code." (*supra*).

Were such a qualification to exist under the Law, a community would be unable to proscribe a baudy house in a residential community.

Conclusion.

The case should be ordered restored to the docket for reconsideration by way of briefing and further argument of the matters of law discussed in the *per curiam* opinion of May 8, 1967.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
RAY T. DREHER,
Counsel for Amicus Curiae.

APPENDIX "A".

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Appellant, vs. Lawrence S. Misuraca, etc., Defendant and Respondent. Superior Court No. CR A 7179. Trial Court No. M-25081.

Appeal by People from order of dismissal, of the Municipal Court of the Los Cerritos Judicial District, John C. Landis, Judge. Reversed.

For Appellant—Evelle J. Younger, District Attorney. Harry Wood, Deputy District Attorney, Harry B. Sondheim, Deputy District Attorney.

For Respondent—Stanley Fleishman, Esq.

Upon motion by defendant at a pre-trial hearing the trial court dismissed counts I, II and III of the complaint charging violations of § 311.2 Penal Code on the ground that the three named books ("Sexpionage," "Black is for Bliss" and "The Naked Archer") were not obscene.

Inasmuch as the case is being sent back for further proceedings in the trial court, we shall set forth our analysis of some of the substantive and procedural questions which govern both our present ruling and the problems which may arise if the motion to dismiss is renewed in the trial court. Except where otherwise indicated, this analysis is based on the following cases: *Roth v. United States* (1957) 354 U.S. 476 [1 L.ed.2d 1498]; *Jacobellis v. Ohio* (1964) 378 U.S. 184 [12 L.ed.2d 793]; *Zeitlin v. Arnebergh* (1963) 59 Cal. 2d

901; *Ginzburg v. United States* (1966) 383 U.S. 463 [16 L.ed.2d 31]; *Mishkin v. State of New York* (1966) 383 U.S. 502 [16 L.ed.2d 56]; and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts* (1966) 383 U.S. 413 [16 L.ed.2d 1] [hereinafter referred to as the *Fanny Hill* case].

To the extent that the California definition of obscenity may be more stringent than that required by the United States Supreme Court decisions, we are guided by *Zeitlin*.[1]

A. With respect to what is obscene[2] we shall in this memorandum arbitrarily divide all such matter[3] into three general classes, for convenience of reference only.

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[1]The California Supreme Court in *Zeitlin* held that the California statutory definition (§ 311 (a) Penal Code) applied only to "hard-core pornography". The United States Supreme Court in *Mishkin* after noting that the New York courts also adopted the "hard-core pornography" test stated that it is "more stringent than the *Roth* definition". (16 L.ed.2d 56 at 61.)

[2]The standard constitutional definition of obscenity is that set forth in *Roth*. Such definition as brought down to date and stated in the *Fanny Hill* case is as follows: "We defined obscenity in Roth in the following terms: 'Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 US, at 489, 1 L ed 2d at 1509. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." (16 L.ed 2d at pp. 5-6.)

Originally "utterly without redeeming social value" was not part of the definition but was descriptive of the material which otherwise met the definition. Now it is part of the definition itself.

[3]"Matter" is defined in § 311 (b) Penal Code.

Class 1. This is matter which is not obscene per se and which never could be classed as obscene regardless of its commercial exploitation as such. It includes the great mass of books and pictures generally read and seen by the public.

Class 2. This consists of that which is obscene per se without any additional showing of commercial exploitation as such. In California under *Zeitlin* this would apply to hard-core pornography only.[4]

Class 3.[5] This includes matter which falls short of being in the second class per se but which may become so by reason of its commercial exploitation as such. It should be noted that the United States Supreme Court in developing this rule in *Ginzburg, Mishkin* and the *Fanny Hill* cases did not change the definition of

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[4]Examples of hard-core pornography are set forth in footnote number 3 to the dissenting opinion of Mr. Justice Stewart in *Ginzburg* as follows: "'. . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . .'" (16 L.ed.2d at 54.)

[5]No Supreme Court decision has yet applied this rule in California and it might be argued that because of the more stringent hard-core pornography definition it has no application here. However, *Mishkin* arose in New York, which has the same hard-core pornography rule and this was noted by the United States Supreme Court in deciding *Mishkin*. We see no reason why it should not apply here, particularly since the rule does not purport to change the definition of obscenity, but deals with evidence. *Zeitlin* did not decide it, because there the book only was on trial.

obscenity but merely held that additional evidence of commercial exploitation by the defendants could be considered in establishing that the material meets the definition.[6]

B. *The difference between the Ginzburg type of evidence and that which has always been received to establish the obscene character of the book.*

To assist the jury and judge in distinguishing between the first two classes, it has been customary to call expert witnesses with respect to the "redeeming social value" and the customary standards in the community and the other issues embraced in the definition. This evidence prior to *Ginzburg* related to the book and to the public and not to the commercial exploitation by the defendant. Prior to *Ginzburg,* generally the book rather than the man was on trial. The problem was whether the book was obscene per se, and therefore not protected, and the evidence was to assist in the determination of such "constitutional fact", i.e., whether the material fell within the first or second class.

Since *Ginzburg,* which recognized the third class, such evidence continues to be just as material and just as important in deciding the "constitutional fact" issue. But, in addition, an entirely new and fundamentally different kind of evidence is to be received and considered. The man, rather than the book, is on trial.

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[6]It is not material to our present lawsuit but to make the classifications complete, there is a fourth class (the converse of the third class) consisting of material normally within class 2 but with respect to which defendants have a defense to prosecution if they have exploited the material within medical, psychiatric and other similar groups only and have made no appeal to their prurient interest. This is suggested by both *Ginzburg* and *Mishkin,* and see § 311.8 Penal Code.

Through evidence of the defendant's commercial exploitation of the book, his own evaluation of the material, and his own efforts in appealing to particular groups of society, the finder of facts gets a deeper insight into just what the defendant is selling.[7]

Such evidence was not discussed in the majority opinions of the United States Supreme Court prior to *Ginzburg* but it had been anticipated in the concurring opinion of Mr. Chief Justice Warren in the *Roth* case when he said (1 L.ed.2d 1498 at 1513): "But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." The latter part of that statement is quoted in the majority opinion in *Ginzburg* (16 L.ed.2d at 40-41).

Also this type of evidence was foreshadowed by the State Supreme Court in *Zeitlin* when it compared the "constitutional fact" evidence with the "historical fact" evidence, the former being evidence of the "character of the material involved" and the latter being evidence of "what happened". (59 Cal.2d 901 at 910.)

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[7]The evidence of commercial exploitation has a bearing on several issues in the case. In the *Fanny Hill* case the principal problem related to the "utterly without redeeming social value" issue. The case held that such evidence was material to this issue. In *Mishkin* (16 L.Ed.2d 56 at 62) it was applied to the "prurient appeal" issue and the court went even further with respect to that issue stating that the prurient appeal can be measured by its appeal to "its intended and probable recipient group". In *Ginzburg* it was applied to the three main issues: (1) prurient appeal, (2) offensiveness, and (3) social importance. (16 L.ed.2d at 38.)

Since the evidence of commercial exploitation is "historical fact" rather than "constitutional fact" evidence as defined in *Zeitlin*, in our opinion it is not the type of evidence which the trial judge weighs in arriving at his independent judgment of the constitutional fact. It is not a matter of book censorship but trial and punishment for conduct of the person. It may result in the conviction of a defendant for selling a book with respect to which another defendant is acquitted. This not only could happen in different parts of the United States but in the same court on the same day with the same jury. And there would be no inconsistency.

Thus, evidence of commercial exploitation should not be received at a pre-trial hearing or any other hearing at which the judge is entertaining a motion to dismiss. It should be presented to the jury during trial and evaluated by the judge only when it becomes necessary to ascertain if as a matter of law it is sufficient. That is, it is like any other evidence received to resolve an issue of fact.

C. *When and how the trial judge should make his independent ruling on the constitutional fact.*

When the book is clearly in class one and this is disclosed by the complaint, the problem can be reached before trial by demurrer. The People so concede, but point to the lack of any statutory authority for a motion to dismiss at that time (or any later time). The People do concede that the decisions require the trial judge to make an independent determination of the "constitutional fact" at some time before judgment but point out that it would fit into normal statutory procedure to do so at the motion for new trial. However, if the constitutional fact issue is determinated by the

trial judge in favor of the defendant, the case should not be re-tried but should be dismissed. Thus even though there is no statutory authority for ruling on a motion by defendant to dismiss, it is a matter of constitutional necessity. Furthermore if this procedure is followed, § 1466 (1) (b) Penal Code preserves to the People the right of appeal.[8]

While it is true that the trial judge has no duty to make his independent ruling earlier than at the time of hearing the motion for new trial, if he does so at a pretrial hearing in order to shorten the trial, and if we concur with his independent ruling on the constitutional issue, a reversal would accomplish nothing except waste the time of the defendant, the prosecutor and the trial court.

On the other hand if the People announce there will be evidence of commercial exploitation, it would normally be an idle act to hear and rule upon the motion to dismiss until after all the evidence has been presented to the jury, probably at the time of motion for new trial. It should be noted that the new trial motion itself may present a similar issue, but, if it is desired to dismiss rather than grant a new trial, it would be preferable to require an express motion to dismiss. This clearly would preserve the right of appeal (*People v. Finch* (1953) 119 Cal.App.2d Supp. 892), although "prodding" by counsel for defendant to rule on the constitutional issue might be a sufficient waiver without the formal motion. Whether passing upon the motion for

[8]Because of differences in code sections regarding appeals from superior court decisions, different procedures may be necessary in that court, as argued by the People, but that does not require us to abandon a workable procedure here.

new trial or a motion to dismiss, the evidence of commercial exploitation should be treated like other factual evidence.

The existence of evidence of commercial exploitation does not eliminate the need to make an independent determination of the constitutional fact. Even where there is such additional evidence, it may be insufficient as a matter of law or the book may be so clearly not obscene that no amount of commercial exploitation could result in conviction. In any case the determination of the constitutional question may result in dismissal.

Once the problems are analyzed the ruling in the present case is apparent. The books are in the third class. Ruling at the pre-trial stage was improper since (1) there was some evidence of the *Ginzburg* type (the covers, inside and out, front and back, of each book), and (2) the People did not stipulate that there would be no *Ginzburg* type evidence presented at the trial. The ruling deprived the People of a jury trial on an issue of fact and we must reverse.

The order of dismissal is reversed.

March 10, 1967.

/s/ Smith
Judge*

We concur:
/s/ Meyer
Acting Presiding Judge
/s/ Whyte
Judge

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*Retired superior court judge assigned by Chairman of the Judicial Council.

San Diego, Calif
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(Cir. D. 111,303 Sun. 213,743)

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Woman Free In Obscenity Case Trial

By MITCH HIMAKA

A Municipal Court jury yesterday found a downtown liquor store owner innocent in an obscenity case involving material which jurors later described as "pure filth."

The jurors after the trial said they felt they had no alternative but to find the woman innocent on the basis of Judge Richard J. Curran's interpretation of Monday's Supreme Court decision.

The defendant was Mrs. Doris Effie, 63, of 666 San Elijo St. She operates Effie's Liquor Store, 636 W. Broadway.

HIGH COURT DECISION

Curran resumed the trial yesterday after calling for a recess to study the Supreme Court's decision handed down Monday.

Deputy City Atty. Shain B. Haug said he had two more witnesses to call to testify, but Curran halted further testimony. He heard arguments from Haug and defense attorney James Marinos and then advised the jury to return a verdict of acquittal.

Curran said he based his advice on the grounds of insufficient evidence.

The jury, despite the advice, deliberated almost four hours before reaching a decision.

BUTLER CONCERNED

City Atty. Ed Butler, informed of the verdict, expressed concern over Curran's action.

"We are concerned that the court did not permit the people to go forward with the presentation of all of the evidence," he said.

"As we read the law, we are entitled to put before the jury all of the evidence on obscenity and pandering that we have. For the court to cut off our case before we have a chance to complete the case, we think, is a miscarriage of justice.

"Certainly in this difficult field of controlling obscenity, we feel the people as well as he defendant are entitled to a ull, complete hearing.

"We think it is a clear error of law on the part of the udge," Butler continued. "However, this will not deter us rom continuing our efforts to prosecute obscenity matters."

CALLED ERROR

Mrs. Effie was charged with eight counts of selling or distributing obscene matter. All of the items involved magazines of male and female nudes, sadism and masochism, Haug said.

A female juror said she thought the pictures were "pure filth."

She said the biggest question, under the recent court decision, involved the pandering or soliciting of customers.

The Supreme Court, in reversing three obscenity cases, ruled that in none of the cases was there evidence of pandering.

JURY INSTRUCTED

Curran, in giving instructions to the jury, said that in order to find the defendant guilty of the crime". . . you must find that the defendant has been guilty of pandering. Pandering is solicitation of customers by appealing to their prurient interests."

"We wanted to find her guilty but under that interpretation, what else could we do?" a juror asked.

She said the jury in the first poll stood 9-3 for conviction and later, after receiving further instruction, 7-5 for conviction. The jury then requested further instruction and finally brought in the acquittal verdict.

Attorney Marinos, following the verdict, asked some of the jurors if they thought the pictures were obscene.

Several of the women jurors answered, "Yes. They were pure filth."

"I'm so upset, I could cry," another woman said as she walked away.

Butler said his office will review the case further.

APPENDIX "B".